

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
7

8 SANDRA L. KINNEY, *et al.*,

No. C-12-4477 EMC

9 Plaintiffs,

RELATED TO

10 v.

No. C-12-4478 EMC

11 BRISTOL-MYERS SQUIBB COMPANY, *et*
12 *al.*,

No. C-12-4615 EMC

No. C-12-4616 EMC

No. C-12-4617 EMC

No. C-12-4619 EMC

No. C-12-4633 EMC

No. C-12-4641 EMC

No. C-12-4642 EMC

No. C-12-4803 EMC

13 Defendants.
14 _____/

15 AND ALL RELATED ACTIONS.

16 **ORDER RE SUPPLEMENTAL
BRIEFING**
17 _____/

18
19 As the parties have informed the Court, the Judicial Panel on Multidistrict Litigation
20 (“MDL”) recently denied without prejudice transfer of the above-referenced cases. The Court thus
21 has pending before it Plaintiffs’ motions to remand.


22 The Court directs the Plaintiffs to file supplemental briefing. Defendants have taken the
23 position that a distributor cannot issue additional warnings beyond those contained in the FDA-
24 approved labeling or, under federal law, they will be subject to civil and/or criminal penalties for
25 misbranding. In their supplemental brief, Plaintiffs should address why a distributor would not be
26 liable for misbranding under federal law if it were to issue such additional warnings beyond those
27 contained in the FDA-approved labeling. The Court notes that it previously asked for supplemental
28 briefing on this very issue in the *Caouette* case, *see Caouette v. Bristol-Myers Squibb Co.*, No. C-12-

1 1814 EMC (Docket No. 41) (Order at 2) (asking “what should McKesson have done in the instant
2 cases to satisfy [the] duty [to warn]” and “how are those actions not inconsistent with or prohibited
3 by federal law”); however, the *Caouette* Plaintiffs did not directly respond, focusing instead on the
4 argument that *Mensing* applies only in the generic drug context. *See id.* (Docket No. 44) (Pls.’
5 Supp. Br. at 8). Plaintiffs in the cases at bar have similarly argued that *Mensing* is restricted to the
6 generic drug context. *See, e.g., Kinney v. Bristol-Myers Squibb Co.*, No. 12-4477 EMC (Docket No.
7 18) (Reply at 10). Plaintiffs have yet to address the question (assuming the logic of *Mensing*’s
8 impossibility analysis applies here) why it is not impossible for a distributor to provide additional
9 warnings (as Plaintiffs contend is required by California law) and not contravene federal law.

10 Although Plaintiffs are represented by different counsel, the Court shall require Plaintiffs to
11 coordinate and file a single supplemental brief. The supplemental brief shall be filed by February
12 26, 2013.

13
14 IT IS SO ORDERED.

15
16 Dated: February 19, 2013

17
18 
19 EDWARD M. CHEN
20 United States District Judge
21
22
23
24
25
26
27
28